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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BENJAMIN FEINLOWITZ,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ARNOLD E. WALLACH
299 Broadway
New York, New York 10007
Attorney for Petitioner

Dated: New York, New York
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitoner, Benjamin Feinlowitz, prays that a writ of certiorari issued to review a final judgment and order of the Court of Appeals of the State of New York entered July 7, 1971 (Appendix A, infra) which affirmed an order of the Supreme Court of the State of New York, Appellate Term, held in and for the Second Judicial Department, 9th and 10th Judicial Districts thereof, made and entered June 26, 1970, which affirmed a judgment of conviction of the petitioner for violating Sections 986 and 986b of the former Penal Law of the State of New York, which was rendered

in the Court of Special Sessions, City of Mt. Vernon, New York after a trial before a Court and jury, July 31, 1969. Thereafter, the petitioner duly moved in the Court of Appeals of the State of New York for an Order permitting re-argument of the Appeal thereto as aforesaid and for a further Order amending the remittitur to show that the constitutional issues involved herein were raised, argued and considered. That motion was denied by an Order of the Court of Appeals made and entered October 7, 1971, denying the motion for a re-argument and denying any relief for an amendment of the remittitur because the opinion of the Circuit Court of Appeals indicated that the constitutional arguments raised were passed upon (Appendix B, infra).

The opinion and dissenting opinion of the said Court of Appeals of the State of New York are re-printed herein in Appendix C, infra. Those opinions are contained in People etc. v. Feinlowitz, reported in 29 N.Y. (2) 176, otherwise reported in 324 N.Y.S. (2) 62.

JURISDICTION

The judgment and Order of the Court of Appeals is dated and was entered July 7, 1971. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1257 (3) and Rule 22 (1) of the Rules of the Supreme Court of the United States.

QUESTIONS INVOLVED

Was an Order of the Supreme Court, Westchester County valid when at the date it was issued, May 17, 1966, it conflicted with Section 605 of the Federal Communications Act, 47 U.S.C. 605, and the evidence procured under the use and exercise of such order enabled the police authorities to procure a search warrant and other evidence used at the trial of the petitioner?

CONSTITUTIONAL AMENDMENTS

AMENDMENT IV

SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, [against unreasonable searches and seizures], shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * *

AMENDMENT XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

STATUTES INVOLVED

47 UNITED STATES CODE, SECTION 605

Unauthorized Publication or Use of Communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning

thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, §605, 48 Stat. 1103.

* * * * *

47 UNITED STATES CODE, SECTION 605
As Amended June 19, 1968, Pub.L. 90-351, Title III, §803, 82 Stat. 223

Subchapter VI—Miscellaneous Provisions

§605. Unauthorized publication or use of communications

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled

thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

As amended June 19, 1968, Pub.L. 90-351, Title III, §803, 82 Stat. 223.

* * * * *

47 UNITED STATES CODE, SECTION 501

Subchapter V—Penal Provisions; Forfeitures

§501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years or both. June 19, 1934, c. 652, Title V, §501, 48 Stat. 1100; Mar. 23, 1954, c. 104, 68 Stat. 30.

* * * * *

18 UNITED STATES CODE, SECTION 2515

Prohibition of Use As Evidence of Intercepted Wire or Oral Communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 216.

* * * * *

18 UNITED STATES CODE, SECTION 2516 (2)

* * * * *

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punish-

able by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 216.

* * * * *

18 UNITED STATES CODE, SECTION 2518

Procedure for Interception of Wire or Oral Communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for

interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter.

* * * * *

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

* * * * *

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

* * * * *

(e) the period of time during which such interception is authorized, including a statement as to whether or nor the interception shall automatically terminate when the described communication has been first obtained.

* * * * *

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and

in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

* * * * *

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order of extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of–

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge or competent jurisdiction the serving of the inventory required by this subsection may be postponed.

* * * * *

1 UNITED STATES CODE, SECTION 109

Repeal of Statutes As Affecting Existing Liabilities

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. July 30, 1947, c. 388, § 1, 61 Stat. 633.

* * * * *

CODE OF CRIMINAL PROCEDURE, SECTION 813-a
(As it existed on May 17, 1966)

Ex Parte Order for Eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead[1] or recorded and the pur-

[1] So in original. Probably should be "overheard".

pose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witnesses he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L. 1958, c. 676, eff. July 1, 1958.

FORMERLY EXISTING PENAL LAW OF THE STATE OF NEW YORK

SECTION 986

Pool-selling, Book-making, Bets and Wagers, et cetera

Any person who engages in pool-selling, or book-making with or without writing at any time or place; or any person who keeps or occupies any room, shed, tenement, tent, booth or building, float or vessel, or any part thereof, or who occupies any place, or stand of any kind, upon any public or private grounds within this state, with books, papers, apparatus or paraphernalia, for the purpose of recording or registering bets or wagers, or of selling pools, and any person who records or registers bets or wagers or sells pools or

makes book, with or without writing, upon the result of any trial or contest of skill, speed or power of endurance of man or beast, or upon the result of any political nomination, appointment or election; or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever; or any person who receives, registers, records or forwards or purports or pretends to receive, register, record or forward in any manner whatsoever, any money, thing or consideration of value, bet or wagered or offered for the purpose of being bet or wagered, by or for any other person, or sells pools, upon any such result; or any person who, being the owner, lessee or occupant of any room, shed, tenement, tent booth or building, float or vessel, or part thereof, or of any grounds within this state knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depositary for gain, hire or reward, of any money, property or thing of value, staked, wagered or pledged, or to be wagered or pledged upon any such result; or any person who aids, assists or abets in any manner in any of the said acts, which are hereby forbidden, is guilty of a misdemeanor, except when another penalty is provided by law. When an exclusive penalty is elsewhere provided by law for an act hereby prohibited, the permitting of the use of premises for the doing of the act in such case shall not be deemed a violation hereof, nor of section nine hundred and seventy-three of the penal law. As amended L.1910, c. 488; L.1934, c. 233, §4; L.1937, c. 596, eff. Sept. 1, 1937.

* * * * *

FORMERLY EXISTING PENAL LAW OF THE STATE OF NEW YORK SECTION 986(b)

Possession of Book-making or Pool-selling Records

Any person other than a peace officer in the performance of his duty as such, who shall knowingly have possession of any writing, paper or document representing or being a record, made by a person engaged in book-making or pool-selling, of a bet or wager upon the result of any trials or contests of skill, speed or power of endurance of man or beast or upon the result of any political nomination, appointment or election or upon any lot, chance, casualty, or unknown or contingent event whatsoever shall be guilty of a misdemeanor. Proof of the possession of any writing, paper or document of the kind mentioned herein is presumptive evidence of possession thereof knowingly. Added L.1960, c. 548, § 1, eff. Sept. 1, 1960.

* * * * *

STATEMENT OF THE CASE.

The petitioner was originally charged in the Court of Special Sessions, City of Mount Vernon, Westchester County, State of New York, for violating sections 986 and 986(b) of the former Penal Law of the State of New York. Prior to trial the petitioner moved to vacate the order authorizing a wiretap the order being dated May 17, 1966, before the County Court Judge who granted it (County Court, Westchester County, State of New York). That motion was denied (211-215, 216-221, 222-228).[2]

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[2]This refers to the pagination of the record on appeal.

THE CONVICTION AND SENTENCE

The petitioner was convicted on both counts and was given two concurrent sentences consisting of 30 day jail terms.

THE EVIDENCE

THE PROCEEDINGS PRIOR TO TRIAL

Judge Sirigano, a Judge of the County Court of Westchester County, in the State of New York, authorized a wire-tap in regard to telephone number 914-667-9366 located at 278 – 4th Avenue, in the City of Mount Vernon, Westchester County, New York which was in a store designated as George's Pharmacy. That order was dated May 17, 1966 and was effective for 60 days until July 16, 1966.

A police officer named, Gipirani, submitted an affidavit in support of the ex-parte application to procure the Order.

As a result of wire-tapping under the said order, the police procurred a search warrant on July 7, 1966 from a Judge of the Court of Special Sessions of the City of Mt. Vernon, Westchester County, State of New York. That search warrant authorized a search of George's Pharmacy, the petitioner and others for writings relating to bets on certain horse races and sporting events as well as the seizure of writing instruments and paraphernalia "commonly" used by persons engaged in illegal wagering. The said search warrant was procurred as a result of a police officer name William Court submitting his affidavit therefor to establish probable cause, on July 7, 1966 (196-202).

The petitioner originally moved to vacate the search warrant, suppress the evidence and also to vacate the wire-tap order. This was prior to trial.

In regard to the application to vacate the wire-tap order, that motion was denied without a hearing by the County Court Judge who granted it. (211-215; 216-228).

In regard to the application to vacate the search warrant to suppress the evidence, it was argued among other things that the search warrant was based on the products of wire-tapping conducted under the aforementioned order authorizing the same (241-245).

That motion was also denied (235, 236).

THE PROSECUTION'S CASE

The trial was had on May 22, 1969 (27). A police officer named William Court testified that he was employed as a police officer by the City of Mount Vernon (33, 34).

Prior to June 15, 1966, that being the date of the offenses, the police officer installed wire-tapping equipment pursuant to the order of Judge Sirigano dated May 17, 1966 (People's Exhibit 1, 203, 204, 33, 34).

Another police officer named Anthony Colarusso, testified that on June 15, 1966 he was accompanied by two other police officers named Cipirani and Burke in this investigation. Cipirani and Colarusso went to "George's Pharmacy" and contacted the other police officer named Burke by radio (48-50).

At that place the police saw the defendant in the phone booth at about 4:23 p.m. of June 15, 1966 (53, 54). Colarusso ordered the defendant to leave the phone booth (54-56). Searching the phone booth, Colarusso seized an envelope and pieces of paper (People's Exhibit 3, 55). Also seized from a shelf in the telephone booth was Five Thousand Dollars in cash (People's Exhibit 4, 56, 57).

From the person of the petitioner the authorities seized the sum of One Thousand Four Hundred Ninty-five Dollars Forty Two cents (58, 59).

The telephone listed under number MO 7-9366 was the instrument subject to the wire-tap order.

Another police officer named, Richard Burke, testified that on June 15, 1966, he monitored and intercepted and and recorded telephone conversations over the subject phone. This police officer put it:

> "Q. Now, when you say 'monitor', tell us exactly what you did?
> A. Well, we had the wire-tap equipment on this particular telephone line, Mount Vernon 7-9366; and I ran the machine that day, hot, all day; in other words, every time a call came in, I just pushed a button which says 'record' on the recorder; and I listen into the conversation with a hand-set, and it recorded on the tape." (72)

Put in evidence as People's exhibit 5 was the tape recording of the intercepted conversations and of the subject telephone on June 15, 1966 (76, 78, 84).

This witness further testified that after intercepting the subject conversations, he removed the tape from the electronic equipment and took it to police headquarters where it was replayed (79). He also related that he put an identification symbol on it and retained custody of the tape until the trial (79).

Put in evidence was People's Exhibit 6 which was a summary of the recorded conversation as recorded on People's Exhibit 5 (81).

As a result of the auditioning and monitoring the witness on June 15, 1966, at 23 minutes after four overheard "sports bets" and the conversation over the telephone which was not recorded by him (84).

The tape was then played before the Court and jury (93-96). Furthermore, it was admitted by this witness that while eavesdropping and interception this witness heard a personal "call" involving others (104).

Counsel at one phase of the trial argued that this procedure violated sections 605 of the Federal Communications Act and the witness should be warned that such violation might constitute a crime and that the witness should be advised. Consequently, the police officer who heard the colloquy stated that he was willing to testify. In other words, this witness knowingly waived his privilege against self-incrimination (91, 92).

REASONS FOR GRANTING THE WRIT

The majority opinion of the Court below, reported in 29 N.Y. (2) 176; 324 N.Y.S. (2) 62 held that even though electronic seizures may have been illegal before the effective date of the Safe Streets Act, nevertheless, they would be validated where there was substantial compliance with the newly enacted provisions of the Safe Streets Act. It was further held that in this case there was such substantial compliance with the subsequently enacted Safe Streets Act so that the Court did not err in allowing wiretap evidence to be presented. See the Omnibus Crime Control and Safe Streets Act, of 1968, Title 3, 18 U.S.C. Sections 2511-2519, effective June 19, 1968.

However, this trial was concluded May 23, 1968. The majority concluded that the findings of Congress were such that Congress sanctioned wire-tapping. It is submitted that even if Congress intended to sanction wire-tapping, Congress did not intend to sanction prior wrong doing and deliberate disregard of a valid statute, namely 47 U.S. 605.

Section 109 of 1 U.S.C. clearly provides that the repeal of a statute does not in any way abate or extinguish any penalties, forfeiture or liability incurred under such statute unless the repealing statute expressly provides.

The police officer himself realized that wire-tapping at the time he conducted it was a crime and he in effect waived the privilege against self-incrimination.

Next, Congress itself recognized that the impact of *Berger v. New York*, 388 U.S. 41, 18 L.Ed.2d 1040, 87 S. Ct. 1873 mandated that any electronic interception had to be limited and conerete. In the legislative history of Title 3 as aforesaid, reported in U.S. Code and Congressional Administrative News, Volume II 90th Congress, 1968, pages 2161, 2162 it was noted that Berger promulgated eight stringent standards which could be the basis for legal wire-tapping.

If Congress intended to amnesty, pardon, immunize and sanction wrong doing to procure evidence of a crime, Congress would have clearly so stated. There is nothing in Title 3 which disclosed that Congress intended the newly enacted statute to be retroactive. The wire-tap order found on pages 203 to 204 of the record nowhere particularized the crime that was being investigated, namely gambling, it nowhere named the petitioner; the order was to run for sixty (60) days, it did not direct the authorities to make a return or inventory of the seized conversations, and finally, aside from the sixty-day duration of the order it nowhere limited the authorities to any particular times of the day or specific periods that the interception was to be conducted. Since it did not name the petitioner, this order authorized an interception that could extend to the conversations of any and all persons using this public telephone.

It is respectfully submitted that *Berger* enunciated the rules that could legalize wire-tapping but that these rules were never adhered to in the procurring of the wire tap order in issue.

It is respectfully submitted that there was no substantial compliance with the newly enacted statutes authorizing wire-tapping. It is further submitted that compliance with the fundamental right of privacy is not satisfied merely by the establishment of probable cause. Privacy also involves the manner of executing search warrants and orders authorizing electronic interception, particularity in regard to the type of conversations sought to be seized, specificity in

regard to the subjects of the wire tapping all of which go to make the intrusion as limited as possible so that the right of privacy would not be unnecessarily punctured.

18 U.S.C. 2515 distinctly provides that where there is wire-tapping or electronic interception, the evidence derived therefrom can only be received in evidence if such disclosure would not be in violation of chapter 119 of 18 U.S.C.

It is therefore respectfully submitted that the enactment of chapter 119 of 18 U.S.C. in no way was helpful to the prosecution in this case. In *Lee v. Florida*, 392 U.S. 378, 20 L. Ed. 2d 1166, 88 S. Ct. 2096, it was stated as follows:

> "...under our constitution, no court, state or federal, may serve as an accomplice to the willful transgression of the 'laws of the United States,' laws by which the Judges in every state are bound..."
>
> "Finally, our decision today is counselled by experience. The hope was expressed in *Schwartz v. Texas* that enforcement of the statutory prohibitions in Section 605 can be achieved under the penal provisions of the Communications Act.... That has proved to be a vain hope. Research has failed to recover a single reported prosecution of a law enforcement officer for violation of Section 605 since the Statute was enacted. We conclude, as we concluded in *Elkins* and *Mapp*, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the Federal Law 'in the only effectively available way by removing the incentive to disregard it...." 392 U.S. 386, 387.

As the record shows, at the time this trial was had Section 605 of the Federal Communications Act, 47 U.S.C. was in effect. The time of trial was on May 22, 1969 to May 23, 1969. The order authorizing this wiretap was based on the then existing New York Statute found in Section 813-a C.C.P. That statute existed simultaneously with Section 605 of the Federal Communications Act since amended and thereby conflicted with it; see *Berger v. New*

York, supra, 388 U.S. 41, 18 L.Ed. 2d 1040, 87 S.Ct. 1873.

Hence, at the time of trial the New York State statute had to give way to section 605. Therefore, if the issue is whether *Berger v. New York, supra,* and the ruling of *Lee v. Florida, supra,* was prospective, the next question is to what extent was it prospective and in what way was its retroactivity limited. It is submitted that the ruling of *Lee v. Florida, supra,* was applicable to this case because the trial was held after *Lee v. Florida* was decided.

On October 28, 1968, this Court decided *Fuller v. Alaska,* 393 U.S. 80, 21 L. Ed. 2d 212, 89 S. Ct. 61. There it was held that the ruling of *Lee v. Florida* was extended to all trials conducted after the holding in *Lee v. Florida.* It was stated:

> "Retroactive application of *Lee* would overturn every State conviction obtained in good-faith reliance on *Schwartz.* Since this result is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*"

393 U.S. 81; 21 L. Ed. 2d 214. See also *Engelman v. Cahn,* 425 F. (2) 954 (C.A.—2) 1969, where it was stated on page 956 in part as follows:

> ". . . The same day the Court decided *Kaiser v. New York,* 394 U.S. 280 . . . and held that neither *Lee* nor *Katz* required overturning a conviction resting on wiretap evidence obtained pursuant to an order under Section 813-a where the wiretap was nontrespassory (as apparently was the case here) and occurred prior to the date of *Katz and the wiretap evidence was introduced prior to the date of Lee.*". (Emphasis supplied)

On March 24, 1969, which was about three months prior to the trial involved in this appeal, the Supreme Court of the United States decided *Kaiser v. New York,* 394 U.S. 280, 22 L. Ed. 2d 274, 89 S. Ct. 1044, which

again reiterated the holdings in *Fuller v. Alaska*, to the effect that wiretapping evidence was admissible if it was introduced at the criminal trial after the date of *Lee v. Florida, supra*, 392 U.S. 378. It is submitted that since this case was decided after Title 3 was enacted, this Court knew that Title 3 was on the books and nevertheless gave full force and effect to *Fuller v. Alaska, supra*, and *Lee v. Florida, supra*.

It is respectfully submitted that to hold otherwise, would result in the following situation where this Court interpretates a Federal Criminal statute in a certain way, and the holding applies to the States, the police cannot be put in a position where they would avoid their obligations to the United States Constitution, Congressional Legislation and this Court, in the expectation that Congress would subsequently repeal the statute. Put another way, the exclusionary rule should also compel respect for the law irrespective of later changes that may or may not be anticipated.

In summary, the State statute former Section 813-a of the Code of Criminal Procedure of the State of New York was unconstitutional and could not be the predicate for the wiretap order at issue; the newly enacted Federal legislation Chapter 119 of 18 U.S.C. and Section 605 of the Federal Communications Act as amended, were not in effect at the time of trial, and hence the wiretap order had absolutely no legislative support and conflicted with the decisions of this Court, as well as the Federal statute. The wiretap order in this case even if there was a federal statute allowing the interception, would be violative of that for the reasons hereinabove enunciated. In other words, as was held in *Cox v. U.S.*, C.A. -10th, October 13, 1971, F.2d -10 Criminal Law Reporter, 2111 it was stated in part that:

> "As we view it, Congress was seeking to deal realistically with highly complex problems in accordance with the demands of the Constitution. We are unable to say that the product fails to satisfy the constitution. Every effort has been made to comply

with the requirements of Berger and Katz. Section 2518 (4) of Title 3 is as precise and discriminate in its approach as are the demands of Berger and Katz. . . The statute calls for the most careful scrutiny of the application and for specific findings and restrictions by the Judge to have the application is presented."

"We must presume that an authorization order drafted in accordance with this section will impose strict limitations of the officer who is to execute the authorization. We cannot presume that it will grant a roving commission or a general warrant to seize any and all conversations coming into the area covered by the device. A Judge will surely scrutinize any application and will scrupulously impose the restrictions required by the statute and by the decisions."

It is respectfully submitted that this wire-tap order in issue in this case, complied with no statute. As was held by Mr. Justice Black, dissenting in *Linkletter v. Walker*, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731, at page 653 of 381 U.S.:

". . . it certainly offends my sense of justice to say that a State holding in jail people who were convicted by unconstitutional methods as a vested interest in keeping them there than outweighs the right of persons adjudged guilty of crimes to challenge their unconstitutional convictions at any time. No words can excuse the simple fact that the promises of Mapp and Noia are to a great extent broken by the decision here. . . "

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Petitioner

Dated: New York, New York
December , 1971

APPENDIX A

REMITTITUR OF THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Court of Appeals

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and seventy-one, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR July 7, 19 71

The People &c.,
Respondent,

vs.

Benjamin Feinlowitz,
Appellant.

Be it Remembered, That on the 26th day of January in the year of our Lord one thousand nine hundred and seventy-one Benjamin Feinlowitz

the appellant- in this cause, came here unto the Court of Appeals, by Paul Crames, his attorney -, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate ~~Division~~ Term of the Supreme Court in and for the Second Judicial Department. And The People &c.,

the respondent - in said cause, afterwards appeared in said Court of Appeals by Carl A. Vergari, District Attorney. ~~attorney.~~

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by

Mr. Arnold E. Wallach,

of counsel for the appellant -, and by

Mr. James J. Duggan,

of counsel for the respondent -,

and after due deliberation had thereon, did order and adjudge that the judgment ~~of the Appellate Division of the Supreme Court appealed from~~ herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions, Mount Vernon, New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Special Sessions, Mount Vernon, New York,

before the Judges thereof, according to the form of the statute, in such case made and provided, to be enforced according to law, and which record now remains in the said Court of Special Sessions, before the Judges thereof, &c.

Raymond J. Cannon

Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,

Albany, July 7, 19 71

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon

Clerk.

APPENDIX B

ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh *day of* October, *A. D. 1971.*

PRESENT, HON. STANLEY H. FULD, *Chief Judge, presiding.*

Mo. No. 849

THE PEOPLE &C.,

RESPONDENT.

v.

BENJAMIN FEINLOWITZ,

APPELLANT.

A motion for reargument and for amendment of the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment, be and the same hereby is denied for the reason that the opinion of the court clearly indicates that the constitutional arguments raised were passed upon.

A copy

/s/ _____
Deputy Clerk.

APPENDIX C

OPINIONS OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

v.

BENJAMIN FEINLOWITZ, *Appellant*.

Argued April 21, 1971; decided July 7, 1971.

[Points of Counsel] [Opinion per Jasen, J.]

Crimes—wiretapping—tape recordings of conversations on public telephone made on June 15, 1966 were properly admitted on defendant's later trial which resulted in conviction for bookmaking, despite invalidation of rule of Olmstead v. United States (277 U.S. 438) by Katz v. United States (389 U.S. 347)—wiretap was admissible in State criminal proceeding, despite Lee v. Florida (392 U.S. 378), by amendment of section 605 of Communications Act of 1934 by Ominbus Crime Control and Safe Streets Act of 1968—seizures here were made in substantial compliance with provisions of Safe Streets Act.

1. Tape recordings of conversations on a public telephone wherein defendant took several bets, made on June 15, 1966, although defendant was convicted of bookmaking and possession of bookmaking records on July 31, 1969, were properly admitted in evidence. At the time the tape recordings of the conversations were made the rule of *Olmstead v. United States* (277 U.S. 438) was applicable holding that a wiretap, conducted without a physical intrustion into defendant's premises, was not an unlawful search and seizure within the meaning of the Fourth Amendment. At the time of the trial, *Katz v. United States* (389 U.S. 347) invalidated the *Olmstead* rule and prohibited the use of such evidence. Since the evidence obtained by the wiretap was admissible when the wiretap was made, the recordings were properly allowed in evidence in the later trial.

2. Section 605 of the Communications Act of 1934 prohibits all tapping of telephone conversations. Evidence seized in violation of section 605 has been held inadmissible in Federal court but admissible in a State criminal proceeding. In *Lee v. Florida* (392 U.S. 378), decided on June 17, 1968, evidence seized in violation of section 605 was held inadmissible in State criminal proceedings. However, on June 19, 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968 wherein it amended section 605 and authorized wiretapping. Under such amendment, the fruits of court authorized wiretaps are admissible in State courts.

3. In seizures made before the effective date of the Safe Streets Act, substantial compliance with its provisions is all that is required to bring the evidence within the newly-enacted exception in section 605. Substantial compliance was present here. The wiretap was obtained under judicial supervision, in full compliance with section 813-a of the Code of Criminal Procedure, with probable cause for the seizure clearly indicated. There is no valid reason to exclude such evidence especially since the police acted in full compliance with both constitutional law and the statutory law of our State as it existed at that time.

Appeal, by permission of the Chief Judge of the Court of Appeals, from a judgment of the Appellate Term of the Supreme Court for the Ninth and Tenth Judicial Districts in the Second Judicial Department, entered June 26, 1970, affirming a judgment rendered in the Mount Vernon City Court, sitting as a Court of Special Sessions (John P. Griffith, J.), convicting defendant of the crimes of bookmaking and possession of bookmaking records.

Arnold E. Wallach, Paul Crames and *Max Fruchtman* for appellant. I. The order authorizing the wiretap order was void because it violated section 605 of the Federal Communications Act. (*Berger v. New York*, 388 U.S. 41; *Lee v. Florida*, 392 U.S. 378; *Fuller v. Alaska*, 393 U.S. 80; *Engleman v. Cahn*, 425 F.2d 954; *Kaiser v. New York*, 394 U.S. 280; *Desist v. United States*, 394 U.S. 244.) II. The wiretap order was not founded on sufficient cause and was improperly granted. (*People v. Morhouse*, 21 NY2d 66;

Spinelli v. United States, 390 U.S. 942; *Sgro v. United States*, 287 U.S. 206; *People v. Kramer*, 38 Misc. 2d 889.) III. The search warrant was void. IV. The court did not charge the jury properly because the court did not interpret the relevant statutes, namely former section 986 and 986-b of the former Penal Law, and charged the law necessary for the jury to arrive at a verdict. (*People v. Abelson*, 309 N.Y. 643; *People v. Koenig*, 34 Misc. 2d 711, 12 NY2d 248; *People v. Cohen*, 243 App. Div. 245; *People v. Best*, 253 App. Div. 491; *People v. Murch*, 263 N.Y. 291; *People v. Wallens*, 297 N.Y. 57; *Giaccio v. Pennsylvania*, 382 U.S. 399.) V. The verdicts based on sections 986 and 986-b of the Penal Law were against the weight of the evidence and contrary to law. (*People v. Abelson*, 309 N.Y. 643; *People v. Smoke*, 38 Misc. 2d 939; *People v. Pearlstone*, 38 Misc. 2d 33; *People v. Lambrix*, 204 N.Y. 261; *People v. Koenig*, 34 Misc. 2d 711.) VI. Appellant's right to a fair trial was prejudiced because the prosecution was allowed to question defendant's witness as to why another possible witness was not produced by the defense. (*People v. Mirenda*, 23 NY2d 439.)

Carl A. Vergari, District Attorney (*James J. Duggan* of counsel), for respondent. I. Appellant's guilt was proved beyond a reasonable doubt. (*People v. Diman*, 11 NY2d 350; *People v. Pearlstone*, 38 Misc. 2d 33; *People v. Sanducci*, 195 N.Y. 361.) II. The wiretap evidence was correctly received. (*Berger v. New York*, 388 U.S. 41; *Katz v. United States*, 389 U.S. 347; *Lee v. Florida*, 392 U.S. 378; *Fuller v. Alaska*, 393 U.S. 80; *Desist v. United States*, 394 U.S. 244; *Kaiser v. New York*, 394 U.S. 280; *Olmstead v. United States*, 277 U.S. 438; *Johnson v. New Jersey*, 384 U.S. 719; *Stovall v. Denno*, 388 U.S. 293.) III. The wiretap order was founded on fully sufficient cause. (*People v. McCall*, 17 NY2d 152; *People v. Kaiser*, 21 NY2d 86; *People v. Malinsky*, 15 NY2d 86; *People v. Schnitzler*, 18 NY2d 457.) IV. The search warrant here was perfectly proper (*Nucklos v. United States*, 99 F.2d 353; *Sgro v. United*

States, 287 U.S. 206; *People v. Kramer*, 38 Misc. 2d 889.) V. The court's charge to the jury was altogether correct. (*People ex rel. Guido v. Calkins*, 9 NY2d 77; *People v. Feld*, 305 N.Y. 322; *People v. Adams*, 21 NY2d 397.) VI. The witness, Stephen Fein, was properly cross-examined.

Jasen, J. The crucial issue in this case concerns the admissibility of certain recordings of defendant's voice obtained as a result of a wiretap made pursuant to court order. We conclude that the admission of the evidence was violative of neither the constitutional nor statutory rights of defendant and that, consequently, his conviction should be affirmed.

In May of 1966, the Mount Vernon Police Department received a tip from an informant, who had previously proven reliable, that a public telephone in George's Pharmacy was being used to transmit horse racing and sporting bets. A detective assigned to observe this location noticed defendant, a known and convicted gambler, repeatedly leave his office (where there was a telephone) and use this public phone booth. Moreover, on one occasion, he overheard defendant discussing baseball lines and quoting odds on that day's games. On the basis of this information, the police secured an order from the Westchester County Court authorizing them to intercept and record conversations over that telephone line.

Pursuant to that order, a tap was installed on May 18, 1966, and was frequently monitored by the police. On June 15, the tap was being monitored by Detective Burke, who overheard several sports bets being transmitted. He immediately contacted two other officers, who then entered the pharmacy and went to the telephone booth. These officers possessed a search warrant authorizing them to search defendant's person. They discovered defendant in the phone booth with the receiver in his hand and with an envelope and two slips of paper lying nearby. He was asked to step

out of the phone booth, where a search of his person revealed $1,495.42 in cash and several other slips of paper. An additional $5,000 in cash was found in the envelope and all of the slips contained sports bets and gambling odds.

The tape of defendant's telephone conversation, which was introduced over his objection at trial, revealed the taking of several bets. Detective John Roach identified one of the records introduced in evidence as a record of the three-team bet which the taped conversation concerned. Richard Bu[redacted]tive who made the recording, identified the voice o[redacted]endant on the tape as the receiver of this bet. Also, at t[redacted]ial, Stephen Fein, the defendant's son, testified in his father's defense. He contended that the cash possessed by defendant was the proceeds of a loan which he (Fein) had obtained to purchase certain machinery for his business. However, no business records were produced to verify this claim.

Upon this record, defendant was convicted by the City Court of Mount Vernon of the crimes of bookmaking and possession of bookmaking records (former Penal Law, §§986, 986-b). For these convictions, defendant was sentenced to concurrent terms of 30 days' imprisonment.

The defendant argues on this appeal that the introduction of evidence obtained by wiretapping was constitutionally impermissible and should have been excluded at the trial. In addition, the defendant urges that the order authorizing the telephone interception was void because it violated section 605 of the Federal Communications Act.

At the time the authorized telephone interception occurred, there were no significant Federal constitutional restraints relative to the securing and using wiretap evidence. The basic pronouncement by the Supreme Court in this area remained *Olmstead v. United States* (277 U.S. 438), which explicitly held that a wiretap, conducted without a physical intrusion into the defendant's premises, was not an unlawful search and seizure within the meaning of the Fourth Amendment. It is thus clear that at the time the

wiretap occurred, the intrusion did not violate the *Olmstead* rule. Moreover, at the time, such conduct in New York was regulated by section 813-a of the Code of Criminal Procedure, which specified procedures for obtaining a court order authorizing a wiretap. There is no contention made here that the dictates of that section were not scrupulously followed.

However, the period between the seizure of the evidence and the judgment of conviction[1] was a time of rapidly changing constitutional interpretation in this area. *Katz v. United States*. (389 U.S. 347) specifically invalidated the long-standing *Olmstead* rule and declared that nontrespassatory seizures were also constitutionally prohibited. Additionally, in *Berger v. New York* (388 U.S. 41) the Supreme Court declared that section 813-a of the Code of Criminal Procedure was at least partially unconstitutional for its overbreadth.[2]

Consequently, the specific problem arising out of this rapidly changing complex of decisional law is to determine precisely what constitutional rule is applicable to this prosecution. The Supreme Court has addressed itself to this perplexing question in two recent cases and, seemingly has provided a rather clear answer. In *Desist v. United States* (394 U.S. 244), the court held that *Katz* is to be applied prospectively only. This was further explained in *Kaiser v. New York* (394 U.S. 280) to mean that if "the wiretapping in this case occurred before *Katz* was decided and was accomplished without any intrusion into a constitutionally protected area of the petitioner, its fruits were not inadmissible under the exclusionary rule of the Fourth and Four-

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[1]The conversation was recorded June 15, 1966, and defendant was convicted July 31, 1969.

[2]The New York Legislature responded to this decision by enacting title III of part VI of the Code of Criminal Procedure (§§814-825), which contains provisions designed to meet the constitutional objections enunciated in the *Berger* case.

teenth Amendments." (394 U.S. 280, 282-283.) *Kaiser* also instructs us that the *Berger* decision is not applicable retroactively. The court there affirmed a decision of this court (see 21 NY2d 86) wherein wiretap evidence had been seized pursuant to section 813-a—later declared unconstitutional in *Berger*. The Supreme Court, thus, affirmed our holding that the *Berger* decision should be given only prospective application (21 NY2d, at p. 98).

A careful examination of the *Desist* and *Kaiser* decisions reveals that the determinative factor in both cases centers on the date upon which the seizure of the evidence occurred. (See 394 U.S., at p. 282.) Hence, if the evidence was seized in a manner constitutionally permissible at the time of seizure, it will subsequently be allowed into evidence at the defendant's trial even though changing constitutional interpretations have since made a similar seizure impermissible.[3] Since it cannot be seriously contended here that the seizure was constitutionally defective by 1966 standards, we conclude that the recordings were properly allowed into evidence at defendant's later trial.

While it is true that the wiretap order was issued in 1966 under a subsequently declared unconstitutional law, the basis upon which it was authorized closely approximates the standards set forth in *Berger*. A close examination of the *Berger* decision reveals that the major constitutional objections to section 813-a were twofold—the fact that the statute only required a reasonable ground to believe that a crime had been committed (rather than probable cause) and a lack of particularity in description of what was to be seized and the evidence sought. Here, there obviously was probable cause for the seizure by reason of the extensive observation of defendant's suspicious

[3] The rationale behind such a dichotomy is quite apparent. The deterrent purpose of an exclusionary rule such as this would not be furthered by excluding evidence seized in a manner that was constitutionally acceptable at that time. Moreover, an exclusionary rule has no real bearing on guilt or the fairness of the trial. (*Linkletter v. Walker*, 381 U.S. 618, 639-639.)

activities. Defendant, a known and convicted gambler, was seen to frequently use a public telephone booth, despite having access to a private telephone at his office. Upon one occasion, a police officer personally heard defendant discussing sports lines on baseball games and quoting odds on the day's games to someone with whom he was in contact on that telephone. Thus, the primary constitutional defect denominated in the *Berger* case was certainly not present here. Moreover, the affidavit in support of the wiretap order specifically described the defendant and his suspected gambling activities, including the specific location to be observed. Under such circumstances, any deviation from the standards enunciated in *Berger* and *Katz* must be considered as harmless in light of the overwhelming evidence against defendant.

We turn then to the second question posed—that the introduction of the wiretap evidence was prohibited by section 605 of the Communications Act of 1934 (U.S. Code, tit. 47, § 605). Section 605, as it read in 1966, stated, in pertinent part, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person". This section has been interpreted to prohibit all wiretapping of telephonic communications (see *Pugach v. Sullivan*, 180 F. Supp. 66, affd. 277 F.2d 739, affd. 365 U.S. 458; *Diamond v. United States*, 108 F.2d 859), except where one party consented to the interception (*United States v. McGuire*, 381 F.2d 306, 314, cert. den. 389 U.S. 1053). This ban upon the interception and divulgence of communications applied to both intrastate and interstate activities. (*Weiss v. United States*, 308 U.S. 321; *People v. Broady*, 5 N.Y.2d 500, cert. den. 361 U.S. 8.)

While the Supreme Court has long held that evidence seized in violation of section 605 was inadmissible in a Federal court (*Nardone v. United States*, 302 U.S. 379), it specifically ruled that section 605 "does not exclude

such evidence in state court proceedings" (*Schwartz v. Texas*, 344 U.S. 199, 203). Thus, at the time the wiretap order was issued in this case, such action was in violation of section 605, but the evidence was admissible in a State criminal proceeding.

After the Federal exclusionary rule had been made applicable to the States by *Mapp v. Ohio* (367 U.S. 643), the Supreme Court took occasion to reconsider *Schwartz* in *Lee v. Florida* (392 U.S. 378, decided June 17, 1968), holding that evidence seized in violation of section 605 was also inadmissible in State criminal proceedings. In *Fuller v. Alaska* (389 U.S. 80), the court held that *Lee* should be given only prospective effect and "applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*." (*Id.*, at p. 81.)

Consequently, defendant argues that *Lee* and *Fuller* mandate the exclusion of the wiretap evidence here. We cannot agree. Two days after *Lee* was decided, the Omnibus Crime Control and Safe Streets Act of 1968[4], which included substantial amendments to section 605, became law. In title III, Congress for the first time enacted a comprehensive scheme authorizing the interception of telephonic communications and specifically authorized the introduction of overheard evidence in court under denominated comprehensive standards. (U.S. Code, tit. 18, §§ 2511-2519.)

Therefore, the question posed is whether section 605, as amended, bars the introduction of evidence obtained as a result of a court-ordered wiretap authorized prior to the amendment.

We believe that Congress did, in fact, intend to sanction prior wiretapping as indicated by its findings enacted as section 801 of the Omnibus Crime Control and Safe Streets Act of 1968, wherein Congress found:

"(a) * * *

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[4]Public Law 90-351; 82 U.S. Stat. 197.

"There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of the communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce * * *

"(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

"(c) Organized criminals make extensive use of wires and oral communications in their criminal activites. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice."

These legislative findings, made prior to the *Lee* decision, at a time when *Schwartz* was still viable, seem to clearly indicate the acceptance by the Federal Legislature of the then generally accepted practice of introducing in State courts the fruits of court authorized wiretaps. There can be no doubt that the purpose of the exclusionary rule enunciated in *Lee* was to enforce compliance with the Federal Communications Act. This rule was built upon an assumption—enunciated in the *Nardone* case—that Congress intended to bar wiretapping by enacting section 605 in 1934. The error in the assumption, however, became apparent subsequent to the Supreme Court's decision in *Lee* when the

Congressional findings enacted as section 801 of the Omnibus Crime Control and Safe Streets Act of 1968 made it abundantly clear that the court had been misreading the Congressional silence in the years since the decision in *Schwartz*. (Cf. BLACK, J., dissenting in *Lee v. Florida*, *supra*, at pp. 387-388). Thus, the enactment of the Safe Streets Act should remove any doubt as to the intent of Congress in this area of the law, and it is axiomatic that on questions of legislative intent, the Legislature is supreme.

To exclude the wiretap evidence in this case on the basis of *Lee* would, in effect, be enforcing a statutory policy, since substantially modified and no longer applicable. We believe the well-established rule, that we give effect to the law as it exists at the time of our decision, should be adhered to. (*People v. Loria*, 10 N.Y.2d 368, 370; *Knapp v. Fasbender*, 1 N.Y.2d 212, 243.)

The question remains as to whether strict compliance with the provisions of the Safe Streets Act or the newly-amended Code of Criminal Procedure is necessary in this case. We think not and hold that in seizures made before the effective date of the Safe Streets Act, substantial compliance with its provisions is all that is required to bring the evidence within the newly-enacted exception in section 605. The crucial fact is that Congress has clearly indicated a policy to allow courtroom use of judicially supervised and controlled wiretaps. Thus, in light of this clearly enunciated policy, it would seem to defeat Congressional intent to require a technical compliance with chapter 119 of title 18 of the United States Code since this would result in the virtual inadmissibility of almost all wiretap evidence obtained before the passage of the Act. Consequently, if on such wiretaps there is a clear showing of substantial compliance with the new standards, the evidence will be deemed admissible.

There can be little doubt that such substantial compliance was present here. The wiretap was obtained under judicial supervision, in full compliance with section 813-a of the

Code of Criminal Procedure, with probable cause for the seizure clearly indicated. Thus, there seems to be no valid reason to exclude such evidence especially since the police acted in full compliance with both constitutional law and the statutory law of our State as it existed at that time.

We have examined the other contentions raised by defendant and find them to be without merit.

Accordingly, the judgment of conviction should be affirmed.

BURKE, J. (dissenting). The majority holds that wiretap evidence, obtained years ago in violation of existing law and inadmissible under the standards established by the Supreme Court, is now admissible at a trial in 1971. We believe that such a holding is clearly in conflict with the decisions of the United States Supreme Court, and, therefore, dissent and vote to reverse.

In *Fuller v. Alaska* (393 U.S. 80 [Oct., 1968]), the Supreme Court held "that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee* [*v. Florida*, 392 U.S. 378, June 17, 1968]" (p. 81). The trial of defendant Feinlowitz commenced on May 22, 1969, almost a year after *Lee* was decided. Inasmuch as *Fuller* was decided after the enactment (June 19, 1968) of the Safe Streets Act (U.S. Code, tit. 18, § 2510 *et seq.*), it is not for this court to say that the Supreme Court's decision is no longer viable. Whether or not, in view of the Safe Streets Act, the *Fuller* holding was advisable is a question properly addressed to the Supreme Court of the United States. To put it another way, the question is simply not open to us. This case does not require a determination of the effect of *subsequent* legislation upon a Supreme Court decision. The *Fuller* case was decided after the Safe Streets Act had been enacted into law. We may not assume that the Supreme Court did not consider the applicability of its provisions.

Nor is an affirmance indicated by the Supreme Court's later decision in *Desist v. United States* (394 U.S. 244). In that case the trial took place before *Lee*. In *Desist*, unlike *Fuller (supra)*, the Supreme Court held that the prospectivity of *Katz v. United States* (389 U.S. 347) would be measured from the date of seizure, the result which the majority reaches herein. Although there is mention of the prospectivity of *Lee*, no change was made in the specific holding of *Fuller*. Moreover, the reasoning which supported the *Desist* holding is inapposite herein. The date of seizure was selected because the exclusionary rule of *Katz* was not foreshadowed by the prior decisions, and it could not be said that the conduct was in knowing violation of constitutional requirements (*Desist v. United States, supra*, p. 254). On the contrary, the proscription of section 605 of the Federal Communications Act (U.S. Code, tit. 47, § 605) against interception of telephonic communications had been the law for many years prior to the *Lee* decision. Judicial integrity, the lack of enforcement of the Federal statute and the disrespect for the Federal statute shown by State officials (*Lee v. Florida, supra*, p. 385-386) impelled the decision. In view of *Mapp v. Ohio* (347 U.S. 643) and its progeny this result was predictable.

The evidence in this case was not only illegally obtained, but illegally divulged by the police to the District Attorney, to the Grand Jury and to the trial jury. (Federal Communications Act, § 605.) Even under the majority reasoning a crime was committed. Under our law there are penal and civil remedies against the police and District Attorneys (*People v. Defore*, 242 N.Y. 13, 19, 24; *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, ___ U.S. ___, 39 U.S. Law Week 4821, June 21, 1971).

In *Silverthorne Lbr. Co. v. United States* (251 U.S. 385, 392) the Supreme Court said: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the

Court but that it shall not be used at all." (See *Nardone v. United States*, 308 U.S. 338; *Benanti v. United States*, 355 U.S. 96.) *Lee* made it clear that a change in public policy was effected, making all the judgments of the Supreme Court of the United States binding on the States, and gave notice to all State officials and courts.

Accordingly, we believe that the judgment should be reversed.

Judges SCHILEPPI, BERGAN, BREITEL and GIBSON concur with Judge JASEN; Judge BURKE dissents and votes to reverse in a separate opinion in which Chief Judge FULD concurs

Judgment affirmed.

Supreme Court, U.S.
FILED
FEB 7 1972

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-870

BENJAMIN FEINLOWITZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CARL A. VERGARI
District Attorney of Westchester County
Court House
White Plains, New York

JANET CUNARD
Assistant District Attorney
Of Counsel

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Pursuant to the Revised Rules of this Court Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Question Presented

The following question is presented by this appeal:

1. Was wiretap evidence seized under a properly issued wiretap order on June 15, 1966 admissible at a trial on May 22-23, 1969?

Facts

In early May, 1966, the Mount Vernon Police Department received information from a reliable source to the effect that a public telephone in an establishment known as George's Pharmacy at 278 Fourth Avenue in Mount

Vernon was being used to transmit horse and sporting bets. A detective was assigned to check out this information, and on several different occasions he observed the appellant leave his office where, incidentally, there was a telephone and go to George's Pharmacy and use this public telephone. On one such occasion he overheard the appellant discussing baseball lines and quoting odds on that day's games. In reliance on this evidence, the police on May 17, 1966, secured an order from the County Court of Westchester County, Honorable P. Raymond Sirignano, J., authorizing them to intercept and record all conversations over that line (20, 203-210). Pursuant to this order, a tap was installed on May 18, 1966, which consisted of a line starter, a pen register and a tape recorder (22, 27).

On June 15, 1966, this telephone was being monitored by Detective Richard Burke. He set up his vigil on the line at 11:15 A. M., and he maintained it until 4:30 P. M. (54). Normally, these taps are watched on a remote basis, by which we mean that the equipment runs and records automatically when the receiver of the phone being tapped is lifted from the cradle, and that the whole tape is picked up at day's end. That's the function of the line starter. On June 15th it was being run "hot" by Burke, who overheard as well as recorded each call as it was going on (54). A minute or two before 4:23 P. M. he heard one or more sports bets being transmitted over that line, and he immediately radioed Captain Cipriani and Sergeant Colarusso (65-66), who it must be assumed were standing by awaiting such a contingency.

Cipriani and Colarusso immediately entered George's Pharmacy and went directly to the public telephone booth (30, 35-36). In addition to Burke's information, the two officers were armed with a search warrant signed on June 7, 1966, by Honorable John P. Griffith, City Judge of the City of Mount Vernon, which authorized them to search the appellant's person (31-35). They found the appellant

in the phone booth with the receiver in his hand, and on the shelf under the telephone they discovered an envelope and two slips of paper. They asked him to step out of the booth, and he did so, leaving the receiver dangling by the cord. Upon searching him the officers found other slips of paper in his jacket pocket, together with $1,495.42 in cash (36-40). The envelope in the phone booth contained an additional $5,000.00 in cash (39). The slips found in the booth, as well as those found in his pocket, were identified as records of sports bets and baseball lines, i.e., the odds on the baseball games being played that day (96-100). Both were described as gambling records (96).

When the two detectives had placed the appellant under arrest, Colarusso picked up the phone the appellant had dropped and told whoever was on the other end that there had been some trouble (41-42). He then phoned his headquarters and asked that they place a call to him at the number specified in the wiretap order. This procedure was to assure themselves that the tap was on the designated line (43-45).

The tape recording of that 4:23 P. M. conversation was played in its entirety to the jury, and the People's gambling expert, Detective John Roach, identified one of the gambling records introduced in evidence as a record of the three team parlay bet which the taped conversation concerned (100-101). Richard Burke, the detective who made the recording, identified the voice of the appellant on the tape as the receiver of this bet (78).

POINT I

Wiretap evidence lawfully seized prior to June 17, 1968, is admissible in a State Court trial occurring after that date.

On May 17, 1966, Honorable P. Raymond Sirignano, County Judge of Westchester County, signed an order permitting the interception of communications being transmit-

ted over telephone number 914 667 9366, a public telephone located in a pharmacy. The wiretap order was issued in accordance with the provisions of 813a of the New York Code of Criminal Procedure then in effect. Subsequently, that section was declared in part, unconstitutional due to its overbreadth (*Berger* v. *New York*, 388 US 41, 18 L. Ed. 2d 1040, 87 S. Ct. 1873), however, such declaration is applied only prospectively (*Kaiser* v. *New York*, 394 US 280, 22 L. Ed. 2d 274, 89 S. Ct. 1044) as the decision has no effect on the truthfinding process.

> "Evidence seized in violation of Section 605 of the Federal Communications Act was 'no less relevant and reliable than that seized in violation of the Fourth Amendment.'"
>
> *Desist* v. *United States*, 394 US 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030, quoting *Fuller* v. *Alaska*, 393 US 80, 21 L. Ed. 2d 212, 89 S. Ct. 61.

The wiretap order was thus constitutionally permissible as it was issued in accordance with the provisions of Section 813a of the New York Code of Criminal Procedure.

Section 605 of the Federal Communications Act then in effect provided (in pertinent part) that,

> "No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person." (47 USC 605.)

Such section did not specifically prohibit interception alone, but did prohibit interception and divulgence of any conversation. However, this Court had previously held that such information could be divulged in a State Court trial.

> "We hold that § 605 applies only to the exclusion in federal court proceedings of evidence obtained and

sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings."

Schwartz v. *Texas*, 344 US 199, 97 L. Ed. 231, 73 S. Ct. 232.

The evidence seized was thus admissible in a State Court trial which may have taken place on that day.

On June 17, 1968, this Court ruled that evidence seized in violation of § 605 would be inadmissible in State court proceedings as there was no other way of preventing violation of the federal law.

"We conclude, as we concluded in *Elkins* and in *Mapp*, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law in the only effectively available way—by removing the incentive to disregard it (*Elkins* v. *United States*, 364 US, at 217)."

Lee v. *Florida*, 392 US 378, 20 L. Ed. 2d 1166, 88 S. Ct. 2096.

As the reason for the new rule was solely to deter future illegal police conduct, the rule was to be applied prospectively only (*Fuller* v. *Alaska*, 393 US 80, 21 L. Ed. 2d 212, 89 S. Ct. 61). As stated by the Court, in considering the exclusionary rule in Chimel, which, it is submitted, is parallel to that in Lee:

"... the Chimel rule will receive sufficient implementation by applying it to those cases involving the admissibility of evidence seized in searches occurring after Chimel was announced on June 23, 1969, and carried out by authorities who through mistake or ignorance have violated the precepts of that decision."

Williams v. *United States*, 401 US 646, 28 L. Ed. 2d 388, 91 S. Ct. 1148.

Therefore, any wiretap evidence seized after June 17, 1968, would not be admissible on trial. If, however, wiretap evidence had been legally seized prior to that date, it would be admissible on trial. Any lingering doubt which may have existed as to the degree of the prospective application of *Lee* was dispelled by the Court's decision in *Kaiser* v. *New York,* 394 US 280, 22 L. Ed. 2d 274, 89 S. Ct. 1044 on March 24, 1969

> "we have held today that Katz is to be applied wholly prospectively. . . . that decision (Lee) has also been held to apply only prospectively."
>
> *Kaiser* v. *New York,* pp. 282-283.

On October 19, 1971, this Court again reaffirmed its holding that wiretap evidence seized prior to June 17, 1968, would be admissible at a trial occurring after that date when it refused to reconsider the issue. *Iannaccone* v. *New York,* cert. den. —— US ——, 30 L. Ed. 2d 164, —— S. Ct. ——).

POINT II

The admission of wiretap evidence is sanctioned by 18 USC title 119.

The petitioner has misstated the date of trial in his petition (p. 18) and thus has misstated the rules in effect on the date of trial. The trial was conducted on May 22 and May 23, 1969, not 1968. Thus, there had been an amendment of 47 USC 605, prior to the date of trial.

Wiretap evidence, to be legally seized, must be obtained under the authority of a Court order.

> "Last Term in *Katz* v. *United States,* 389 US 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 . . . we concluded that since every electronic eavesdropping upon private conversations is a search or seizure, it can comply with con-

stitutional standards only when authorized by a neutral magistrate upon a showing of probable cause and under precise limitations and appropriate safeguards,"

Desist v. *US*, 394 US 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030.

The seizure in the instant case was based upon a Court order properly issued under the New York statute then in effect and hence the evidence in question was lawfully seized (*Kaiser* v. *New York, supra*).

On June 19, 1968, almost a year prior to trial, § 605 of the Federal Communications Act was amended and the portion thereof which would apply to the instant case, transferred to title 18, Chapter 119. § 2515 provides that when any interception has taken place any disclosure is prohibited if there would be a violation of the Chapter. There are thus, again, two separate acts, the interception and the disclosure. (Compare: 18 USC 2517; former 47 USC 605). If the interception is lawful, the evidence obtained therefrom is admissible. It has already been determined that the evidence in the instant case was lawfully seized; therefore, it must follow that such is admissible in evidence.

"Both petitioners were duly convicted when judged by the then existing law; the authorities violated neither petitioner's rights either before or at trial."

Williams v. *United States*, 401 US 646, 28 L. Ed 2d 388, 91 S. Ct. 1148.

Thus, wiretap evidence lawfully seized on June 15, 1966, was properly admitted against the defendant at his trial on May 22 and 23, 1969.

Conclusion

In summary, the position of the respondent is that under previous law the wiretap warrant was valid when executed and subsequent changes in the law do not retroactively invalidate the warrant. The statutory prohibition against introducing wiretap evidence at trial was repealed prior to the tral and the repeal operated prospectively viz-a-viz the time of trial to permit the introduction into evidence of the wiretap maferial. The new statutory requirements with respect to wiretaps were prospective only viz-a-viz the time of the execution of the wretap warrant and accordingly, did not operate retroactively to invalidate the wiretap here. Further, it is respectfully submitted that the unique timing of this case with respect to the tap and to the introduction of the wiretap material into evidence will not be repeated in future cases and accordingly, the situation represented by this case is with respect to future cases purely academic and does not justify the granting of certiorari.

Respectfully submitted,

CARL A. VERGARI
District Attorney of Westchester County
Office and Post Office Address
Court House
White Plains, N. Y. 10601

JANET CUNARD
Assistant District Attorney
Of Counsel